Questions such as are raised in the principal case invariably depend largely upon the presence or absence of a number of facts apparently unimportant, but which considered as a whole are the turning points of the decision. The decision in the present case shows how closely the Courts will adhere to the fundamental principles and early doctrines of the common law, while at the same time keeping in accord with the Negotiable Instruments Act.[13]

W. A. W.

RIGHT TO CORPORATE DIVIDENDS—LIFE TENANT AND REMAINDERMAN—Two recent cases in Connecticut[1] and Massachusetts[2] illustrate the application of the rule that cash dividends, however large, are income and go to the life-tenant, while stock dividends, however made, are capital and go to the remainderman.[3] The corpus of the trust estate in each case consisted of shares in the same corporation, and both questions arose from the same dividend declaration. In neither case was the language of the testator sufficiently explicit of itself to govern the distribution. The D., L. & W. R. R. Co., a Pennsylvania corporation, invested part of its surplus earnings by subscribing for and taking the stock of the Lackawanna R. R. Co., a New Jersey corporation, whose line formed a cut-off between two points on the road of the Pennsylvania company, and so materially shortened its track. The Pennsylvania Company took a perpetual lease of the railroad and all other property of the New Jersey company, agreeing to pay by way of rental four per cent. per annum on the capital stock of the latter corporation. The D., L. & W. R. R. Co. then declared an extra dividend of thirty-five per cent. to its own shareholders payable in the stock of the Lackawanna R. R. Co.[4]

Both Courts decided that this dividend, although payable in the form of stock, in reality represented income, had all the characteristics of a cash dividend, and therefore belonged to the life-tenant. A true stock dividend, said the Massachusetts Court, does not diminish the property of the company, but by it each new share in the increased capital stock represents a smaller fractional interest in the total amount of the corporate property; on the other hand, a cash dividend out of profits diminishes the property of the company by exactly the amount so distributed, but does not lessen the fractional interest in the capital represented by each share. The Connecticut Court said that the stock thus distributed

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[13] R. C. 1905, Section 6366, 6370.

[1] Trust Co. v. Taintor, 83 Atl. Rep. 697 (Conn., 1912).

[2] Gray v. Hemenway, 98 N. E. Rep. 789 (Mass., 1912).

[3] For a full discussion of the various rules governing the distribution of corporate dividends, see note in University of Pennsylvania Law Review, Vol. 60, page 130 (1911–12).

[4] "Resolved, that an extra dividend of 35 per cent on the capital stock of the company be and is hereby declared payable by the distribution of the stock of the Lackawanna Railroad Company of New Jersey ...."

ceased to be a part of the surplus assets of the corporation and passed from its control and ownership: that such a distribution had all of the characteristics of a cash dividend: that the remainderman had failed to meet the burden placed upon him of showing that the rule giving cash dividends to the life tenant should not apply in this instance and that their decision, therefore, was for the latter.[5]

Such were the positive holdings of the two Courts; it is of interest to examine the contentions of the remaindermen, and consider whether, if upheld, they would have discharged the burden referred to above. It was argued in the Connecticut Court that the real transaction underlying the acquisition of Lackawanna stock and the dividend declaration by the D., L. & W. was the perpetual obligation of the latter road to pay four per cent. annual rental to the former for their short cut; that this obligation imposed a liability on the D., L. & W. stock to the amount of the rental, and brought the case within *Bishop* v. *Bishop*.[6] The Court said, however, that in the present case, the stock being purchased, the company incurred no liability from the fact of its distribution, and that it would be necessary to assume facts outside of the record to impose such liability in this instance. The intimation of the Court then is, that if these shares in fact represented an obligation of the company they would go to the remainderman, being not a part of surplus assets, but a charge on those assets.

Counsel contended in the Massachusetts case that this dividend was simply a profit resulting from natural increases in value and fortunate investment, and therefore belonged to the corpus of the estate on the ground that increase and income are not synonymous.[7] The Court conceded the principle, but refused to apply it.

In both Courts, the point was raised that the road's transaction in effect amounted to a capitalization of its surplus, as it was invested in permanent improvements intended and calculated to obtain for it a shorter line by reason of the Lackawanna cut; that therefore, as between owners of successive stock interests, this surplus had become so associated with the working capital that it could not be separated therefrom, and should go to the remainderman. Each Court refused to adopt this view, holding that the

[5] A corporation has no power to make a dividend from its capital stock except in liquidation, and therefore dividends are presumptively of profits; since the right to dividends is in him who has the beneficial interest at the time of declaration, *prima facie* all dividends should go to the life tenant, and the burden of proving otherwise be on the remainderman. See 1 Thompson on Corps, §2193.

[6] 81 Conn. 509 (1909). In this case, the Adams Express Co. declared a dividend in the form of bonds secured by assets of the Company set apart for their payment, but for which the Company directly assumed the liability of payment. Held, that such bonds belonged to the corpus of the estate.

[7] Smith v. Hooper, 95 Md. 16 (1902) in which trustees by investments in stock and realty enormously increased the corpus of the estate. Held, that the life tenant was entitled to the income from the whole estate, but not to the increase in the corpus above the original fund.

purchase of shares of the other road was none the ess an investment because an added advantage besides a fair income accrued as a result. The Connecticut Court referred to *Smith* v. *Dana*,[8] where the facts were much stronger for the proposition that the distribution was of capital, and yet the remainderman failed. The Court in that case reasoned that "capital" used in its correct sense referred to those resources contributed directly or indirectly by shareholders as the financial basis for the prosecution of the business, and which form the foundation for the issuing of capital stock. Such resources are dedicated to the obligations of the corporation, and are removed from the discretion of the directors except in liquidation.[9] Directors may either put earnings back into the property, give a cash dividend to stockholders, or declare a stock dividend by transferring surplus to capital. In the last instance, the surplus so treated is irrevocably beyond their control; but in the first instance, since it was originally in their discretion whether to distribute the earnings to the stockholders or not, it is only fair that they should be allowed to give back where they have taken away. That is, the position of the Connecticut Court is that accumulated profits put back into permanent improvements may be set free and distributed as cash dividends. The Massachusetts Court in the principal case expressed no opinion on this point, but a previous decision[10] indicates that they would in all probability adopt the same view. An English case[11] looks in the same direction, and it is submitted that the Connecticut doctrine represents the more liberal tendency of the law in treating such situations.

As pointed out in the note already referred to,[12] this doctrine that all stock dividends shall go to the remainderman and all cash dividends to the life tenant has developed, from a rule of thumb to be applied alike in all states of facts, to an inquiry into the substance of each transaction. It is submitted that this development is correct in principle and equity. The subject of the controversy in each case is the capital of the trust estate, and not the capital of the corporation, and by the above method the intention of the testator, which must be the ruling factor ultimately,[13] is more fully realized. When a man leaves stock in trust for A to take the income, he does not intend that the receipt of that income shall be dependant upon the form in which the directors may elect to clothe their dividend declarations. The inquiry must be to ascertain when dividends in reality represent capital and when income to

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[8] 77 Conn. 543 (1905). In this case surplus earnings of a corporation had been put into a plant, fixtures, etc.; on account of competition, it became advisable to sell such property, and a dividend consisting of funds so realized was declared. Held, that the life tenant was entitled.

[9] 1 Thompson on Corps. §1060.

[10] Hemenway v. Hemenway, 181 Mass. 406 (1902).

[11] Bouch v. Sproule, 12 App. Cas. 385 (Eng., 1887).

[12] University of Pennsylvania Law Review, Vol. 60, p. 130 (1911–12).

[13] Gibbons v. Mahon, 136 U. S. 549 (1890).

the trust estate; the two comparatively simple principal cases illustrate one method of attacking the problem, and indicate several of the difficulties which must necessarily arise in more complex states of fact.

S. A.

STATUTE OF FRAUDS—REAL ESTATE—DELIVERY OF THE MEMORANDUM—*Lowther* v. *Potter*[1] was a suit for the specific performance of a contract for the sale of certain real estate. The contract itself appears to have been oral, but two deeds were to be prepared for different portions of the premises, and were in fact made, but never delivered. The deeds did not contain a recital that they were made in pursuance of a previous contract. Defendant demurred to the bill on the ground that the contract was not in writing, and that there was no written memorandum or note thereof signed by the defendants or by their authorized agent, as required by law.[2] Plaintiff relied upon the undelivered deeds as a sufficient memorandum or note in writing of the contract to take the case out of the statute. The question therefore, in its last analysis is whether an undelivered deed is a sufficient note or memorandum of an oral contract for the sale of real estate to satisfy the statute of frauds. The Court held that under the circumstances of the case, the statute was not satisfied, and the demurrer was sustained.

There is considerable conflict of authority on the question whether an undelivered deed will satisfy the statute of frauds. In certain jurisdictions, there are definite decisions to the effect that "a deed drawn and executed with the knowledge of both parties with a view to the consummation of the contract of sale, which in itself, and of itself, embodies the substance, though not all the details or particulars of the contract, naming the parties, expressing the consideration, and describing the lands, though not delivered and its delivery postponed until the happening of a future event, is a note or memorandum of the contract sufficient to satisfy the words, the spirit, and the purpose of the statute of frauds."[3] In the jurisdictions upholding this view, however, an undelivered deed is only regarded as meeting the requirements of the statute where it is in fact a note or memorandum of the contract, referring specifically to its terms and conditions. If the deed is silent as to the terms of the contract, in pursuance of which it is made, it is no evidence in writing of such contract.[4]

The weight of authority, however, appears to support the pro-

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[1] 129 Fed. 196 (Ky., 1912).

[2] Kentucky statutes, Section 420. The Kentucky statute is substantially the same as the English Statute of Frauds.

[3] Jenkins v. Harrison, 66 Ala. 345 (1880), affirmed in Johnson v. Jones, 85 Ala. 286 (1887); see also Bowles v. Woodson, 6 Grattan, 78 (Va., 1849), and McGee v. Blankenship, 95 N. C. 563, at p. 569 (1886).

[4] Kopp et al. v. Reiter et al., 146 Ill. 437 (1893).